

ICTR-98-44-T  
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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding  
Judge G. Gustave Kam  
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 19 August 2008

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Dennis Byron

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S MOTION FOR  
BINDING ORDER TO THE  
UNITED STATES OF AMERICA

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The Office of the Prosecutor:

Mr. Don Webster  
Ms. Allayne Frankson-Wallace  
Mr. Iain Morley  
Ms. Gerda Visser  
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson  
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves the Trial Chamber, pursuant to Article 28 and Rule 54, for an order to the United States of America requiring the production of the following documents:

- (1) all minutes, notes or memoranda of the meeting on 14 May 2003 between the United States War Crimes Ambassador (Pierre Prosper), the ICTR Prosecutor (Carla del Ponte), and officials of the Rwandan government at the U.S. State Department in Washington, D.C.
- (2) all minutes, notes or memoranda of the meeting on 16 May 2003 between the United States War Crimes Ambassador (Pierre Prosper), the ICTR Prosecutor (Carla del Ponte)
- (3) the document entitled "Summary of the Conclusions between the Rwandan government and the ICTR" dated between 14-16 May 2003
- (4) all memoranda, correspondence, or reports prepared by the Office of War Crimes Ambassador or Office of United States Representative to the United Nations between 2003-2008 concerning the issue of whether RPF crimes should be prosecuted at the ICTR

2. Article 28 provides:

1. States shall cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda."

3. Trial Chambers of the ICTR, including this one, have applied their powers pursuant to Rule 54 and issued binding orders to States where the request sets forth:

- (1) the nature of the evidence sought with particularity;

- (2) the relevance of that evidence to the trial; and
- (3) the efforts that have been made to obtain the evidence.<sup>1</sup>

4. An examination of each of these criteria demonstrates that Mr. Nzirorera satisfies the requirements for the issuance of a binding order to the United States of America.

#### **Particularity requirement**

5. The purpose of the requirement of particularity is to enable the requested State to locate the records without undue burden. This Trial Chamber has previously recognized that descriptions of categories of documents may meet the particularity requirement where the documents are readily locatable and identifiable.<sup>2</sup>

6. The documents sought by requests (1), (2), and (3) are precisely identified. The documents sought by request (4) constitute a category of documents, but are all located within two small offices within the State Department. Therefore, there should be no burden on the United States in identifying and producing the limited number of documents requested.

#### **Relevance requirement**

7. The reason for seeking this information is to support a Motion to Dismiss for Selective Prosecution to be filed on behalf of Mr. Nzirorera. The information will assist Mr. Nzirorera to establish the required element of a discriminatory motive on the part of the ICTR Prosecutor for prosecuting only Hutus and members of the former government.

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<sup>1</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Request the Cooperation of the Government of a State* (23 February 2005) at para. 4; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance* (7 February 2005); *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium* (9 November 2005) at para. 10

<sup>2</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Cooperation of Government of Rwanda: RPF Archives* (21 January 2008) at para. 4

8. In her book, *Peace and Punishment*, Florence Hartmann, the former spokesperson for the ICTY and ICTR Prosecutor Carla del Ponte, has alleged that Prosecutor Del Ponte was prepared to prosecute high level RPF members at the ICTR, but was pressured not to do so for political reasons by the United States government and the government of Rwanda. A copy of the relevant portions of her book, translated into English, is attached as Annex "A" to this motion.

9. The meetings and documents for which documentation is sought are described in Ms. Hartmann's book, and she was a participant in those meetings. Therefore, the documents sought are relevant to establish through official documentation that the decision not to prosecute the RPF was made on political grounds.

10. In *Prosecutor v Delalic et al.*<sup>3</sup>, the ICTY Appeals Chamber recognized the discretion of the Prosecutor in bringing indictments before the Tribunal, but noted:

"The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect for the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by recognized principles of human rights."<sup>4</sup>

11. The Appeals Chamber went on to refer to Article 21(1) of the ICTY Statute, which is the same as Article 20(1) of the ICTR Statute, stating that "All persons shall be equal before the International Tribunal." The court said:

"The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law based upon impermissible motives such as , *inter alia*, race, colour,

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<sup>3</sup> No. IT-96-21-A (21 February 2001)

<sup>4</sup> Para 604.

religion, opinion, national or ethnic origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination.”<sup>5</sup>

12. Since Article 3 of the ICTR Statute prohibits discrimination on based upon “national, political, ethnic, racial or religious grounds”, the decision not to prosecute members of a group on political grounds would constitute an impermissible exercise of prosecutorial discretion, as would a decision on ethnic grounds.

13. Mr. Nzirorera believes that the Prosecutor’s decision to prosecute him, while refusing to prosecute RPF officials, is based on discriminatory motives, including his Hutu ethnicity and his political affiliation with the MRND and Interim Government, as opposed to those of Tutsi ethnicity and members of the RPF. The documents sought from the United States can materially assist him in establishing the reasons for the ICTR’s failure to prosecute RPF members.

14. Therefore, Mr. Nzirorera has established that the documents for which he seeks a binding order are relevant and necessary for his defence.

#### **Efforts to Obtain the Material**

15. On 11 July 2008, Mr. Nzirorera requested the documents from the United States government.<sup>6</sup> After more than a month, the United States government has not responded substantively to the request.<sup>7</sup>

16. Mr. Nzirorera remains committed to continue working with the United States to allow them to furnish the material voluntarily prior to the issuance of a binding order.

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<sup>5</sup> Para 605.

<sup>6</sup> A copy of the request is attached as Annex “B”

<sup>7</sup> Copies of the e-mail correspondence are attached as Annex “C”

However, given the stage of his trial, he is not able to delay the filing of this motion any longer.

17. Therefore, Mr. Nzirorera has fulfilled the third requirement for a binding order by making efforts to obtain the material from the United States voluntarily.

**Conclusion**

18. This is a legacy issue. History will judge the Tribunal, those who established it, and those who participated in it, harshly unless the issue of victor's justice is fully aired and explored. The records sought from the United States are necessary to do that.

Respectfully submitted,

A handwritten signature in cursive script that reads "Peter Robinson". The signature is written in dark ink and is positioned above the printed name.

PETER ROBINSON

Lead Counsel for Joseph Nzirorera

**ANNEX "A"**

FLORENCE HARTMANN

**PEACE AND PUNISHMENT**

**THE SECRET CONFLICT  
BETWEEN POLITICS AND  
INTERNATIONAL JUSTICE**

Flammarion

Extracts translated into English from the original French  
 Numbers on the left hand side of the page refer to the original pagination in the French  
 text

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 As for the ICTR, American interests were different, as was the environment. The United States wanted to ensure it had the support of its Rwandan allies for closing down the Tribunal in Arusha, even though it was far from having finished judging the high ups of the former Hutu administration, which instigated the genocide of 1994 in which nearly a million Tutsis and moderate Hutu perished in a hundred days. When it was made known, in November 2001, that the Tribunal would soon be closing, the Rwandan authorities protested, considering that the idea was premature. But President Paul Kagame was not difficult to convince. Carla Del Ponte, in December 1999, had opened investigations into Tutsi officers of the army of the Rwandan Patriotic Front (RPF) under Kagame's command. These investigations, known as "special investigations", did not relate to the genocide of Tutsis, the primary mandate of the ICTR, but to the massacres of the genocidaires and ordinary Hutu civilians who fled Rwanda in large numbers before the advance of the RPF. By virtue of their military victory, which put an end to the genocide, the President-General reckoned that his men were not to be held accountable to the justice of an international community which had allowed the Tutsis to be massacred. Prosper promised that the closing of the ICTR would put an end to these disturbing investigations. It would make it possible, at the same time, to short circuit the inclination of Judge Jean-Louis Bruguiere to have President Kagame indicted by the ICTR. Since 1998, the French judge had been in charge of the inquiry into the attack on the plane of Rwandan president Juvénal Habyarimana, which was shot down on

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April 6, 1994, a few hours before the genocide began. His inquiry was initiated by the families of the three French members of the crew who perished together with the Rwandan president and his Burundian counterpart. The Judge was convinced that Paul Kagame was the instigator of this attack. However, even though his investigations had reached the conclusion that the current Rwandan Président was involved, the immunity granted in France to Heads of State in situ prevented any prosecution there. Rather he would have to ask the UN to make the ICTR, or its prosecutor, use their power to begin a prosecution<sup>8</sup>. In November 2001, the Americans were interested in Judge Bruguiere's progress at the ICTR and questioned Del Ponte on what she knew about Kagame. But

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<sup>8</sup> On 17 November 2006 Judge Bruguiere officially delivered the conclusions of his inquiry, which had finished in 2004. He named Paul Kagame as having presumptively ordered the attack which was the event which caused the genocide to begin. Nine international arrest warrants were issued for "complicity in assassination" against those close to the Rwandan president, among them James Kabarebe, Chief of the General Staff of the Rwandan Defence Forces and Charles Kayonga, Chief of the General Staff of the Army. Rwanda immediately broke off diplomatic relations with France, accusing it of genocide denial and of wishing to hide its role in training Rwandan soldiers implicated in the massacres. France was an ally of the Hutu regime which prepared and put into action the genocide of 1994. On 19 April 2007 Rwanda began an action against France before the International Court of Justice (ICJ), accusing it of infringing international law in seeking to prosecute President Paul Kagame and some of those close to him.

they did not at this time make known their opposition to any proceedings against their ally in the area of the Great Lakes, or against his entourage. For the time being, the American strategy to precipitate the closure of the ICTR consisted in exerting pressures on African governments to give up the Rwandans who had fled and taken refuge on their territory. These steps were offered as proof of American support for the two International Tribunals and led to three arrests out of the twenty-two Rwandans indicted in their absence.

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The International Tribunals were by now perceived as providing justice at too high a price, without quantifiable impact and as having a destabilising effect both in Rwanda and in ex-Yugoslavia: they were simply obstacles to the management of the post-war period. Americans and Europeans intended to allow the Tribunals to continue their case work until 2008 but instructed the prosecution to finish its investigations by the end of 2004. And, imposing their authority, they voted budgetary cuts which mainly affected the prosecution. With her back to the wall, Del Ponte had to reduce her programme of prosecutions. Standing at one hundred and fifty suspects during 2000, the list was reduced by the end of 2001 to a hundred and eight priority suspects. It would still need until 2015 to try them. At the end of 2002, the list was divided into two categories. On one side, the cases which could not be tried elsewhere than at the International Tribunals; on the other, those cases which could be given up to local jurisdictions. The teams concentrated, from this time on, on the first list. The investigations concerning around fifty of suspects on the second list were put on ice. If time allowed, they would be worked on further before being transmitted to the ex-Yugoslav prosecutors. Del Ponte did not want to give up them because, for the moment, the local courts were not able to guarantee credible justice. Through fear of deterring co-operation, she did not publicly announce the drastic cuts which she had just made. On October 30, 2002, Del Ponte endeavoured to convince the Security Council not to let the completion strategy operate to the detriment of justice. She argued that if it ordered the prosecution to narrow the focus of its prosecutions, and the judges to prepare transfers, it must at the same time equip Bosnia-Herzégovina with a jurisdiction capable of taking over. It must also exert the pressure necessary to obtain the arrest of fugitives and gain access to the files and the witnesses that Belgrade and also Zagreb refused to give. "It is imperative that the highly placed civilians in power and soldiers are arrested without delay and that a special Court is created, since without this the time limits can not be complied with... Only in these circumstances will the International Tribunal be able to plan to conclude its mission with the certainty of having rendered justice ", explained Del Ponte. The Security Council had been formally requested, on October 10, by the President of the International Tribunal to intervene in the lack of co-operation by Belgrade. The Security Council refused to pass a resolution requiring Serbia to arrest the fugitives and to stop blocking the work of international justice. Meanwhile Mladic remained in Belgrade, under the protection of the army, with the complicity of the Head of the State, Kostunica. Zoran Djindjic, the Serbian Prime Minister, did not have sufficient power to be able to arrest him. A mandatory resolution of the Security Council could have helped him to convince the Serb political community. However Pierre Richard Prosper reassured Del Ponte: American financial assistance, granted each year in Belgrade, was conditional on the arrest of the

fugitives: it would not be given if Mladic was not arrested before spring 2003. He did not keep his promise.

Prosper remained deaf to the recommendations of the International Tribunal. At the beginning of 2003, he made it more obvious than ever that the Americans wished to subject the court to an entirely political management of its exit strategy. At the time of a visit in Belgrade in January, he proposed to the authorities that they should arrest four of the twenty fugitives living in Serbia: Karadzic, Mladic as well as Slijivancanin and Radic, wanted in connection with the Vukovar affair. It promised them, in return, the suspension of the investigations in progress which were likely to put in the dock a good part of the Serbian government at the time of the war in Bosnia and in Kosovo, of whom certain members were still in power. The Belgrade press took note straight away of this disengagement with the International Tribunal by the American superpower. Most of the papers were delighted and believed they could see in the American move the sign of a desire not to allow the International Tribunal to govern the destiny of ex-Yugoslavia and bind the hands of the politicians. Del Ponte asked the Americans to state that this was not the case. A few weeks later Prosper complied, during a press conference at The Hague. But in fact he continued his secret negotiations with the purpose of deterring any co-operation by the local governments with the International Tribunal, who were aware that their dilatory manoeuvres had every chance of paying off.

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The Europeans evinced indifference to this meddling which was holding up to ridicule the principle of independent justice which they had previously defended. Del Ponte had told them in mid 2003: "I have reached a standstill. There are nineteen fugitives in Serbia, among them Karadzic and Mladic, but nobody wants to hear about the International Tribunal any more. As if I should close the doors after the Milosevic case [the end of which was then envisaged by the beginning of 2005]. "But the Europeans only want to talk about one thing: the courts are expensive and "do not produce a return on investment". Some go as far as to say: "They are worth neither the time nor the money which is devoted to them." A side effect of the ICC was to drive the International Tribunal out of the Europeans' concerns; they failed to understand that this abandonment suited the American administration's crusade against international justice. The great powers from now on had no further scruples in taking the decision to close the court. Informal discussions within the Security Council for the adoption of a resolution formalizing the calendar of closure of the two International Tribunals started in spring 2003. The year 2003 was to be the high point of international justice's difficulties in maintaining its principles in the face of political powerplay. The debates on Iraq had just divided the members of the Security Council. The glasshouse was in turmoil. The International Tribunal business was sorted out, and no delay was merited on that subject. The preparation of the resolution was a simple formality. At least for France, Russia and China. Although fixated by the war in Iraq, the United States and Great Britain saw the opportunity to kill two birds with one stone. In mid-May 2003, Prosper forced a meeting between the Rwandan leaders and the prosecutor of the International Tribunals Carla del Ponte. For a year relations between Kigali and Arusha had been at a low point. In the summer of 2002, the Rwandan government had, for several weeks, paralysed the genocide trials by preventing the arrival of the witness-victims in Arusha. Del Ponte